SUPREME COURT, U.S.
FILED
DEC 13 2010
OFFICE OF THE CLERK

No. 09-1476

IN THE
Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATE AND LOCAL LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATE AND LOCAL LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici are organizations whose members include municipal, county, and state governments and officials throughout the United States.[1] These organizations regularly file *amicus* briefs in cases that, like this one, raise issues of vital concern to the nation's cities, counties, and states.

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that public employees' speech is protected under the First Amendment only when it involves a matter of public concern.

In the present case, the Court is asked to decide whether the Third Circuit—in disagreement with every other circuit court and every state court of last resort that has considered the question—correctly held that the First Amendment's Petition Clause nonetheless protects a private workplace grievance that does not implicate a matter of public concern merely because the grievance is aired through some formal dispute resolution mechanism.

If this Court adopts the Third Circuit's view, it will open the door for state and local government employees to make "a federal case" out of every garden variety employment dispute, seriously undermining the purpose and effect of the rule the Court recognized in *Connick*.

The resolution of this question will impact every state and local government because of its potential to unleash a torrent of federal lawsuits by public employees against their government employers based on purely private employment matters. For this reason, the *amici* have a substantial interest in this case and a unique perspective on its proper resolution.

The individual *amici* organizations are as follows:

The National Conference of State Legislatures (NCSL) is a bipartisan organization that represents state legislatures throughout the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies.

The National League of Cities (NLC) was established in 1924 by and for reform-minded state municipal leagues. Today it represents more than 19,000 cities, villages, and towns across the country. NLC's mission is to strengthen and promote cities as centers of opportunity, leadership, and governance; to provide programs and services that enable local leaders to better serve their communities; and to function as a national resource and advocate for the municipal governments it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's counties. It advances county-related issues with a unified voice before the federal government and assists counties in finding and sharing solutions.

The International City/County Management Association is a non-profit professional and educational organization for chief appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments worldwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that when a government employer disciplines an employee for speech that is not a "matter of public concern," such discipline is not considered an abridgement of the employee's First Amendment rights because the employee's speech is not protected by the First Amendment (the "*Connick* rule"). The

Connick rule was crafted to protect government officials from the fear that their routine employment decisions would subject them to lawsuits and potential liability for constitutional torts. *Id.* at 143. The *Connick* rule therefore keeps those officials on the same plane as nongovernmental employers, who are free to discipline employers without any such fear. *Id.* at 147.

The Third Circuit has held, contrary to settled law in the vast majority of the country, that the *Connick* rule does not apply when an employee is disciplined for "petitioning" activity rather than "speech." Respondent asks that this Court affirm the Third Circuit, thereby carving out petition claims from the ambit of the *Connick* rule. As Petitioners' brief demonstrates, such a carve-out is untenable because the Petition and Speech Clauses must be considered in parity with one another. *See* Pet. Br. 16-25, 39-40.

The flaws in the Third Circuit's position become even more evident when the *Connick* rule is viewed as part of a larger body of law safeguarding the ability of government officials to perform their duties effectively, such as the qualified immunity doctrine.[2] This Court's reasoning in the qualified immunity context strongly supports consistent application of the *Connick* rule to all First Amendment claims,

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[2] *Amici* recognize that qualified immunity does not apply to local governments, as opposed to the officials who work for such entities. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). *Amici* are not suggesting that qualified immunity applies to the Borough of Duryea. Their point is rather to put *Connick* into a larger context by examining the principles that underlie both the *Connick* rule and the qualified immunity doctrine.

whether they arise from the Free Speech or the Petition Clause.

By forcing public officials to make employment decisions based on a guess as to whether a disgruntled employee is "petitioning" or just "speaking," the Third Circuit has exposed officials to the very legal uncertainty that this Court consistently has sought to minimize. The Third Circuit's misguided policy should not be allowed to become the law of the land. The decision should be reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION UNDERMINES THIS COURT'S BROAD JURISPRUDENCE PROTECTING PUBLIC OFFICIALS FROM LITIGATION THAT WOULD INTERFERE WITH THE PERFORMANCE OF THEIR DUTIES.

A. *Connick* And Its Progeny Are Based On The Recognition That Public Employers Could Not Function If All Of Their Personnel Decisions Were Subject To Federal Judicial Review.

Until the mid-20th century, "a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick*, 461 U.S. at 143. This Court departed from that position in a series of decisions culminating in *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, in which the Court held that the First Amendment protects a public employee's right to speak on issues of public importance. 391 U.S. 563, 574 (1968). At the same time, this Court recognized

that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those that it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568. Accordingly, this Court emphasized that even where a public employee is "commenting upon matters of public concern," the employee's right to do so must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

For the next fifteen years, this Court repeatedly stressed the importance of safeguarding the interests of public employers for the reasons stated in *Pickering*. *See, e.g., U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 564 (1973) (upholding constitutionality of Hatch Act's prohibition against active political campaigning by federal employees); *Kelley v. Johnson*, 425 U.S. 238, 244-245 (1976) (upholding police department's personal appearance standards).

It was "the common sense realization that government offices could not function if every employment decision became a constitutional matter" that led this Court to establish the *Connick* rule, limiting public employees' First Amendment rights under *Pickering* to speech on matters of public concern. *Connick*, 461 U.S. at 143; *accord, e.g., Rutan v. Republican Party of Ill.*, 497 U.S. 62, 99 (1990); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). As this Court explained in *Connick*, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 461 U.S. at 147. Like their private counterparts,

"government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146-147 (First Amendment "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state"); *accord, e.g.*, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008). In this Court's eyes, this "wide latitude" requires "a wide degree of deference to the employer's judgment"; government employers can discipline employees for speech acts based on the risk of a possible disruption, without having to establish that a disruption has taken place. *Connick*, 461 U.S. at 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action").

This Court echoed *Connick*'s concern with protecting public officials in subsequent cases. In *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, for example, this Court recognized that "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer." 473 U.S. 788, 805 (1985) (upholding government's limitations on employees' participation in charity drive because "[t]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs") (internal quotations omitted). Two years later, in *Rankin v. McPherson*, this Court similarly acknowledged that "public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions." 483 U.S. 378, 384 (1987).

The next major evolution of the *Connick* rule occurred in *Waters v. Churchill*, 511 U.S. 661 (1994), in which this Court held that *Connick* bars a public employee's free speech claims as long as the employer reasonably *believed* that the speech was not about a matter of public concern, *even if that belief was mistaken*.[3] In doing so, this Court for the first time squarely considered the question: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?" *Id.* at 671 (plurality opinion of O'Connor, J.). In an extensive review of this Court's jurisprudence regarding the First Amendment rights of public employees, the four-Justice *Waters* plurality explained that even when employee speech is "nondisruptive" or "of value to the speakers and the listeners," this Court has "declined to question government employers' decisions on such matters." *Id.* at 674. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Id.* at 674-675.

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[3] The four-Justice plurality, joined by two dissenting Justices, held that an employer's mistaken belief that an employee's speech was not of public concern would only trigger the *Connick* rule if that belief was reasonable. *Id.* at 677-79 (plurality opinion), 685 (Souter, J., concurring) (noting that the two dissenting Justices shared this position), 697 n.4 (Stevens, J., dissenting). The three remaining Justices—Justices Scalia, Kennedy and Thomas—joined the plurality in holding that the *Connick* rule applies to an employer's "mistaken belief," but would have applied the *Connick* rule to *any* instance of an employer's mistaken belief, whether the mistake was reasonable or not. *Id.* at 686-694.

Otherwise, a public official would be left to ask "not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw." *Id.* at 676.

Over the last fifteen years, this Court has not swerved from the principles animating the rules set forth in *Connick* and *Waters*. In *City of San Diego, Cal. v. Roe*, for example, this Court observed that the absence of the *Connick* rule "could compromise the proper functioning of government offices" and upheld a police department's imposition of discipline on an officer for posting an online masturbation video. 543 U.S. 77, 82-83 (2004) (per curiam). Even more recently, in *Garcetti v. Ceballos*, this Court noted the "emphasis of our precedents on affording government employers sufficient discretion to manage their operations," and echoed the *Connick* court's warnings against empowering public employees to "'constitutionalize'" their grievances. 547 U.S. 410, 417-423 (2006) (quoting *Connick*, 461 U.S. at 154) (holding that a deputy district attorney could be disciplined under the *Connick* rule for speech in an office memorandum made pursuant to his professional duties). In sum, the creation and evolution of the *Connick* rule has consistently been guided by the Court's recognition that public officials cannot function effectively if they are constantly threatened by the specter of constitutional litigation over their employment decisions.

B. Like the *Connick* Rule, The Doctrine Of Qualified Immunity Was Established To Ensure That Public Officials Can Function Effectively.

This Court first articulated the doctrine of "qualified immunity" in *Scheuer v. Rhodes*, 416 U.S.

232, 247-248 (1974) (abrogated in part by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). As initially conceived, an official enjoyed qualified immunity when she committed a constitutional violation based on a "good-faith belief" that her conduct was legal, as long as there were "reasonable grounds for the belief formed at the time and in light of all the circumstances." *Id.* at 247-248.[4]

In *Scheuer*, this Court recognized "two mutually dependent rationales" for the historical existence of official immunity: "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 240. Implicit in the second of these rationales "is a recognition that [public officials] may err," and "that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242; *see also id.* at 245 ("a policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does") (internal quotations omitted).

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court explained that denying qualified immunity to public officials would "unfairly impose upon [them] the burden of mistakes made in good faith in the course of exercising [their] discretion within the scope

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[4] The *Scheuer* court distinguished qualified immunity from "absolute" immunity, under which no inquiry is made into the official's belief or its basis. *Id.* at 242-243.

of [their] official duties," and "undoubtedly deter even the most conscientious [official] from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the [public]." *Id.* at 319-320. Indeed, the "most capable candidates . . . might be deterred" altogether "from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure." *Id.* at 320. *Wood* nevertheless held, in line with *Scheuer*, that a qualified immunity defense could be overcome in one of two ways: *either* (a) objectively, by showing that the defendant should have known of the illegality of her act based on clearly established law at the time; *or* (b) subjectively, by showing that the defendant had "the malicious intention to cause a deprivation of constitutional rights." *Id.* at 321-322.

In 1982, this Court expanded the qualified immunity doctrine to better serve the goal of protecting public officials by eliminating the subjective prong of the *Scheuer*/*Wood* test. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982). The *Harlow* Court observed that a meritless suit against public officials would cause harm "not only to the defendant officials, but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Id.* at 814 (internal quotations omitted). Because subjective good faith is often an issue of fact for a jury, allowing qualified immunity to be defeated by an inquiry into a defendant's subjective motives would increase the risk that a

meritless suit could continue all the way through trial. *Id.* at 815-816. This Court reasoned that removing this risk "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818; *accord Saucier v. Katz*, 533 U.S. 194, 202 (2001) (abrogated in part on other grounds in *Pearson v. Callahan*, 129 S. Ct. 808 (2009)).

Accordingly, *Harlow* reformulated the qualified immunity inquiry so that the only relevant question is whether a public official's conduct was objectively reasonable because it did not violate "clearly established law" at the time of her decision. 457 U.S. at 818; *see also Mitchell v. Forsyth*, 472 U.S. 511, 525-526 (1985) ("The conception animating the qualified immunity doctrine as set forth in *Harlow* . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences'") (quoting *Harlow*, 457 U.S. at 819 (internal quotations omitted)).

Since *Harlow*, the Court's qualified immunity jurisprudence has increasingly focused on the fact that public officials can be paralyzed not only by the fear of meritless suits, but also by the concern that they might unknowingly commit constitutional violations when the governing legal rules are uncertain. In *Davis v. Scherer*, for example, the Court "recognized that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." 468 U.S. 183, 195 (1984); *accord Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity doctrine's

"accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (question of whether applicable law was clearly established at time of alleged constitutional violation must be evaluated based on a specific conception of the violated right, as liability based on a generalized conception would "mak[e] it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages") (internal quotations omitted).

A comparison of the *Connick* rule and the qualified immunity doctrine demonstrates that both carefully balance the rights of individuals to vindicate legitimate constitutional claims against the public's need for assertive and efficient government action. Both seek to give government officials wide latitude in performing their duties in order to minimize costly disruption from courts, even to the extent of shielding such officials when their conduct is not demonstrably justified. *Compare, e.g., Connick*, 461 U.S. at 146-147, 152 ("we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"), *with Hunter*, 502 U.S. at 229 (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted). And both highlight the damage caused when officials are uncertain about what they can and cannot do in the performance of their duties. *Compare, e.g., Waters*, 511 U.S. at 676, *with Anderson*, 483 U.S. at 639.

C. The Third Circuit's Arbitrary Distinction Between Public Employees' Speech And Petition-Based First Amendment Claims Exposes Public Officials To The Very Interference From Which This Court Consistently Has Sought To Protect Them.

The *Connick* rule's placement in a larger body of law that shields public officers from litigation is not simply a point of academic interest. It highlights the Third Circuit's error in refusing to apply the *Connick* rule to petition-based retaliation claims.

First, in *San Filippo v. Bongiovanni*—the opinion in which the Third Circuit first refused to apply *Connick* to petition claims—the Third Circuit justified its conclusion primarily by distinguishing the First Amendment's Free Speech and Petition Clauses. 30 F.3d 424, 439-443 (3d Cir. 1994). But, even if the Third Circuit's proffered distinctions were valid—we agree with Petitioners that they are not, *see infra*—they do not explain why petition claims are any different from the wide variety of other types of claims against which public officials are protected by qualified immunity.

Second, this Court's caselaw governing qualified immunity makes clear that legal standards for government officials should apply "'across the board,'" rather than in a manner contingent on the employee interests at issue. *Anderson*, 483 U.S. at 642 (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)); *accord Saucier*, 533 U.S. at 203. The plaintiffs in *Anderson* argued that qualified immunity should not apply to Fourth Amendment claims because such claims already implicate "unreasonable" conduct by defendants, or alternatively, that certain subsets of

such claims should be excepted from immunity based on common-law principles. 483 U.S. at 642-645. This Court rejected the plaintiffs' argument, noting that it had in the past "been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Id.* at 642. "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide." *Id.* Because the *Anderson* plaintiffs could not carry the "heavy burden" of justifying why Fourth Amendment claims should be exempted from the qualified immunity doctrine, the Court declined to carve out the proposed exceptions. *Id.* at 642-645; *see also Saucier*, 533 U.S. at 203 (refusing to except excessive force claims from qualified immunity).

The same concerns call for "across-the-board" application of the *Connick* rule. Government employers should not be forced to fine-tune their management of personnel based on "the precise character of the particular rights alleged to have been violated," *Anderson*, 483 U.S. at 642, whether those rights spring from the Speech Clause or the Petition Clause.

Third, the Third Circuit in *San Filippo* held that petition claims are different from speech claims because "when one files a 'petition' one is not appealing over government's head to the general citizenry; when one files a 'petition' one is addressing government and asking government to fix what, allegedly, government has broken or has failed in its duty to repair." 30 F.3d at 441-442. This conclusion

suffers from at least three fatal flaws. First, the Third Circuit's starting premise—that an employee would necessarily be petitioning the *same* government that is employing her—is false: often, for example, a *state* or *local* government employee will petition a *federal* agency such as the EEOC, in which case the employee *is* in fact going over her employer's head. *See, e.g.*, *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 n.24 (3d Cir. 2006) (noting that borough manager's complaint to EEOC would have qualified as petitioning activity). Second, the *San Filippo* court's ruling sweeps too broadly; it is undisputed that employee *speech* directed toward an employer is covered by the *Connick* rule. *See, e.g.*, *Garcetti*, 547 U.S. at 414 (employee disciplined for memorandum directed to supervisors). This undercuts the assertion that *petitions* should be exempt from the *Connick* rule merely because they might be directed at the employer. Finally, and perhaps most importantly, the Third Circuit's carve-out of petition claims "is an invitation to the wary to formulate their speech on matters of private concern as a lawsuit or grievance in order to avoid being disciplined," an end-run around *Connick* that "would undermine the government's special role as an employer." *San Filippo*, 30 F.3d at 449 (Becker, J., dissenting).[5]

Fourth, the end-run decried by Judge Becker is illogical and pernicious given this Court's decades-old admonition that petition and free speech rights "are

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[5] It is not hard to imagine that the threat of such an end-run would create perverse incentives for government employers to *minimize* their employees' abilities to petition (i.e., by reducing the availability of grievance procedures) so that employers are not susceptible to the very constitutionalization of employee grievances that *Connick* was designed to prevent.

inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances"); *accord United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (right to petition is "intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press"); *Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982); *see also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of that Amendment").

Because of their inseparable nature, claims under the Petition and Speech Clauses "are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (citing *Claiborne Hardware*, 458 U.S. at 911-915); *see also Bill Johnson's Restaurants, Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 743 (1983) ("Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition") (internal citations omitted); *accord BE & K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 530-531 (2002). Following this precedent, this Court has unequivocally rejected the argument that the Petition Clause has "special First Amendment status." *McDonald*, 472 U.S. at 485. Noting that "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," the *McDonald* court held that the right to petition under the First Amendment carries no greater immunity

from defamation suits than the right to free speech. *Id.*

The argument advanced by Respondent is essentially the same as the one rejected in *McDonald*. Like the petitioner in *McDonald*, Respondent asks this Court to recognize his petition rights in a context in which his free speech rights unquestionably would not apply.[6] Respondent's contention fails for the reasons stated in *McDonald*.

The intertwined nature of speech and petition rights renders the Third Circuit's position not only illogical, but also destructive to the legal certainty that government officials need to perform their duties. *See* Section I, *supra*. The line between petitioning and speaking is a blurry one, *see* Pet. Br. 29-34, creating a confusion that is apparent in the inconsistent treatment given to petition claims in Third Circuit decisions citing *San Filippo*. *See, e.g.*, *Hill*, 455 F.3d at 242 n.24 (stating without explana-

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[6] The *San Filippo* court tried to confine *McDonald* to its facts in a footnote, 30 F.3d at 442 n.21, but *McDonald*'s sweeping language belies any such cramped interpretation of its holding. The Third Circuit also expressed concern that application of the *Connick* rule to petition claims would render the Petition Clause redundant of the Speech Clause, *id.* at 442-443, but the consistent application of *Connick*'s limiting rule across First Amendment claims does not render them "redundant" any more than the consistent application of qualified immunity to *all* constitutional claims renders all of the provisions of the Constitution redundant of one another. *See id.* at 450 (Becker, J., dissenting) ("*Inter alia*, the clause would still have use when there is a 'petition,' in lieu of more conventional speech"). Moreover, any overlap between the Speech and Petition Clauses is not due to the whittling away of the Petition Clause, but rather the expansion of the concept of speech to cover most if not all petitioning conduct. *Id.*

tion that "reporting a superior's misconduct to a legislative body when the legislative body is also the reporter's employer" is not petitioning activity); *Foraker v. Chaffinch*, 501 F.3d 231, 237-238 (3d Cir. 2007) (stating that strength of petition rights depend on formality of petitioning channels, and holding that internal grievances did not constitute petitions).

Under *San Filippo*, it is unclear what a public employer should do if an employee submits a complaint about a matter of personal rather than public concern: should the employer consider the complaint to be "speech" or "petitioning"? What if the employee threatens to file a formal grievance in a letter to the employing agency? In these and other such ambiguous situations, the employer's safest course would be to consider itself prohibited from disciplining the employee because there is a chance that the employee's behavior would be considered "petitioning" rather than speech. But this is exactly the kind of decision-making through intimidation that rules such as qualified immunity and the *Connick* rule were meant to prevent. *See Hunter*, 502 U.S. at 229 (qualified immunity doctrine's "accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued") (internal quotations omitted). In short, the Third Circuit's refusal to apply the *Connick* rule to petition claims undermines the settled interests of government officials long protected by this Court. It should be overturned.

CONCLUSION

For the reasons stated in this brief and in the Petitioners' brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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December 13, 2010